IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES, Petitioner, vs. JAMES J. JOHNSTON, Respondent.	No. 415

RESPONDENT'S BRIEF.

The petition of the Government herein applies for a writ of certiorari to review the mandate of the Circuit Court of Appeals, Second Circuit, entered in the above cause, by which mandate the Circuit Court of Appeals reversed the judgment of the District Court for the Southern District of New York on a conviction on twelve counts of an indictment in which the respondent was charged with violations, in eight counts, of Sections 800, 802 and 1308 of the Internal Revenue Law, known as the Revenue Act of 1918, and in four counts with the crime of embezzlement.

Questions Involved.

The questions involved as stated by the Government are as follows:

1. Whether a corporation, because it holds a state license, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person receiving payment for admissions to collect the taxes and account for and pay them over to the Government.

2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.

3. Whether the Court erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

Facts.

The Central Manhattan Boxing Club, Inc., secured a license from the New York State Boxing Commission to conduct boxing exhibitions at its clubhouse in New York City and the respondent, by contract, became its "agent, matchmaker and manager" for the period of one year, and agreed to pay the club the sum of Seven Hundred and Fifty Dollars ($750) a month except for the months of July and August "for the aforesaid ex-

clusive arrangement," agreeing to hold at least one boxing match each month. The indictment, it is significant to note, made no reference to such a contract or to the Central Manhattan Boxing Club, Inc., or to any arrangement between the club and respondent whatever. It proceeded on the theory that the boxing exhibitions were conducted by respondent; that he collected the admissions and the "Federal tax of one cent for each ten cents, or fraction thereof" paid or chargeable for admissions to such exhibitions and that his failure to account for such tax and pay same over to the Collector of Internal Revenue constituted a violation of the Revenue Act. The Circuit Court of Appeals in its opinion, from which we quote, stated the facts and legal result as follows:

> "The contract was not a mere renting of the premises. The corporation employed the services of Johnston as well. He paid a fixed sum as stated in the contract, which meant that the club was to obtain the first profits and be assured that they would reach a total sum of Seven hundred and fifty dollars a month. The nature of the business may have demanded that. Whatever may have been the foundation for this arrangement, it was the agreement of the parties. We think that the Federal tax should be paid, as was the State tax, by the corporation. In a legal sense, the box office receipts belonged to the principal or the employer of the plaintiff-in-error—the corporation. His collection of the admission money was as agent or manager with the vested interest as described in the contract. Therefore, the corporation owning the box office receipts became the custodian of the Federal tax collected to be subsequently paid to the Government. Within the purview of the New

> York statute permitting boxing exhibitions, he was not the conductor of the contests nor the collector of the money. It is not claimed nor proven that the plaintiff-in-error aided or abetted the corporation in the wilful failure to pay the tax."

The proof showed the assistant treasurer of the Central Manhattan Boxing Club, Inc., one Joe O'Brien, collected the admission fees and there was a total failure of proof that the respondent collected or touched a cent of money taken in at the boxing exhibitions, either for admission fees or as Federal tax.

The whole case went off and was reversed because the Court found that the corporation was custodian of the Federal tax collected and payable to the Government and, further, that the respondent neither aided nor abetted the corporation in its failure to pay or account for the tax.

It is true as to the third, sixth, ninth and twelfth counts of the indictment, in which respondent was charged with embezzlement, that the Court held, pursuant to a ruling of the Treasury Department (Internal Revenue Bulletin, Vol. I, No. 25, issued June, 1922), that the moneys collected as Federal tax did not become the property of the Government until it had been paid to the Collector of Internal Revenue and therefore that there could be no embezzlement of such funds.

The Revenue Act imposing the "tax of one cent for each ten cents or fraction thereof paid to any place for admission," provides (Sec. 502)

> "that every person, corporation, partnership or association receiving any payments * * * or collect the amount of the tax, if any, im-

> posed * * * and shall make monthly returns under oath, in duplicate, and pay the tax so collected to the Collector of Internal Revenue of the District in the principal office where place of business is located."

Section 1308 (d) defines the term "person" as used in the above section as follows:

> "The term person as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

It will be noted that respondent was neither an officer nor employee of the Central Manhattan Boxing Club, Inc. Nor was he under any duty to perform the act in respect of which alleged violations occurred.

Argument.

The Government asks first:

> "1. Whether a corporation, because it holds a state license, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person receiving payment for admissions to collect the taxes and account for and pay them over to the Government."

The answer to the question is obvious. There could have been no manipulation of the corporate affairs which would have relieved it, or some re-

sponsible person for it, from the responsibility to collect and account and pay the taxes imposed by the Government on admissions charged or chargeable to persons who attended the boxing exhibitions. If, by contract, the responsibility for this duty, primarily imposed on the corporation, could have been transferred to or imposed on any third person, all that the Government needed to have done would be to plead the facts and set out the contract, agreement or arrangement by which, or as a result of which, such novation was accomplished. If, on the other hand, the Government was not bound by any private arrangement of the parties, then the corporation and its officers chargeable with the collection of the tax and accountability for it would at all times remain responsible, both in civil and criminal proceedings. The difficulty in this case was that the prosecuting officers did not grasp this fact and proceed accordingly.

> "2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.
>
> 3. Whether the court erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law."

In answer to questions 2 and 3, propounded by the Government, all that need be said is that the opinion of the Circuit Court of Appeals as to the property of the Government in taxes and moneys the instant they are paid by spectators was not decisive of the case, and whether or not this Court agrees with the Circuit Court of Appeals in hold-

ing (a) that the money doesn't become the property of the United States unless or until paid to the United States, and (b) that the ruling contained in the Internal Revenue Bulletin does not constitute a regulation of the Treasury Department having the force and effect of law, is immaterial for the same reason. If the Treasury opinion is not tenable, it seems that it is up to the Treasury Department to promulgate a new ruling. And it would seem that if the ruling, as the Government contends, "opens a door to fraudulent transactions," that the Treasury Department should see to it that the door is closed.

If there is any loophole in the Revenue Act as construed by the Treasury Department and by the Circuit Court of Appeals in this case, it is not the function of the courts to block it up, but is a matter for Congress to remove by amendment to the existing law.

Right to the Writ.

The right of the Government to prosecute an appeal, or writ of error, in criminal cases is governed by the Criminal Appeals Act of March 2, 1907 (Chap. 2564, 34 Stat. 1246). This act has never been held to extend the right of certiorari, permitting the Government to bring a writ of certiorari to this Court after a reversal of a judgment of conviction in a criminal case in the Circuit Court of Appeals, where the defendant below was convicted after trial by Court and jury as in the case at bar.

No case can be found by counsel in which this Court has ever granted a writ of certiorari to the

Government to review the judgment of the Circuit Court of Appeals reversing a judgment of conviction in any criminal case, after a trial thereof by Court and jury in the District Court.

The purpose of the Criminal Appeals Act is to grant to the Government the right to review the decisions of the lower Courts only in cases as set forth in the Criminal Appeals Act and therein specifically enumerated. Since said act is inclusive and no provision is made for a writ of certiorari by this Court directed to the Circuit Court of Appeals, where the Circuit Court of Appeals had reversed a judgment of conviction, this Court has no jurisdiction to entertain the petition filed by the Government.

Section 240 of the present Judicial Code in no way supersedes the Criminal Appeals Act, and in no way does it enlarge the right of the Government to appeal in the case at bar by certiorari or other means.

The limitations imposed upon the right of the Government of the United States to appeal by certiorari or otherwise to this Court, as contained in the Criminal Appeals Statute above referred to, are fully discussed in the case of *United States* v. *Keitel,* 211 U. S. 370, at page 398, wherein the Court, passing upon this question, stated as follows:

> "* * * that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms

> of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

To the same effect is the case of *United States* v. *Dickinson,* 213 U. S. 92, wherein this Court held that a writ of certiorari cannot be granted in a criminal case at the instance of the United States, regardless of what may be the supposed importance of the question involved.

The Court, further discussing the question, held, in substance, that the Act of March 2, 1907, quoted *supra,* giving the Government the right to appeal in certain criminal cases, could not be extended beyond its terms or construed so as to extend the power of certiorari to bring up for review a criminal case in this Court at the instance of the Government of the United States.

To issue a writ of certiorari on application of the Government of the United States, in the case at bar, would be to pervert the writ of certiorari to the purposes of a writ of error.

Respectfully submitted,

THOMAS C. BRADLEY,
Evans Building,
Washington, D. C.,
Attorney for Respondent.

ARTHUR N. SAGER,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 111.

UNITED STATES

vs.

JAMES J. JOHNSTON, *Defendant.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT.

THOMAS C. BRADLEY,
Attorney for Defendant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CASES CITED.

STATUTES CITED.

OTHER CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 111.

UNITED STATES
vs.
JAMES J. JOHNSTON, *Defendant.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT.

STATEMENT.

The defendant, James J. Johnston, was indicted September 9, 1921, on twelve counts, in eight of which he is charged with violations of Sections 800, 802 and 1308 of the Internal Revenue Law, known as the Revenue Act of 1918, and in four of which he is charged with embezzlement.

The proof shows that the defendant entered into a contract about November 26, 1920, with the Central Manhattan Boxing Club, Inc., to act as its "*agent, match-maker and manager—under its charter and license,*" for a period of one year. The Central Manhattan Boxing Club, Inc., was incorporated under the laws of the State of New York, and secured a license from the New York State Boxing Commission to conduct boxing exhibitions at its clubhouse located on 155th Street at Eighth Avenue.

The contract was received in evidence over objection (R. pp. 47-49), and is as follows:

> "For valuable consideration and the sum of One Dollar herewith paid in hand to each other by the parties to this agreement, the receipt whereof is hereby acknowledged, it is hereby agreed as follows:
>
> The party of the second part being desirous to exclusively conduct boxing contests as the agent, match-maker and manager of the Manhattan Athletic Club under the charter and license held by it for the period of one year from the date hereof, and the party of the first part being agreeable to such exclusive arrangement, it is understood by the parties hereto that the following arrangement shall hold good during the life of this agreement.
>
> The party of the second part agrees to pay to the party of the first part $750.00 a month, except that for the months of July and August the sum of $500.00 is to be paid, for the aforesaid exclusive arrangement.
>
> The party of the second part agrees to hold at least one boxing contest each month, and agrees to pay to the party of the first part $400.00 one week prior to the day set for each contest, and $350.00 on the evening of the contest, except that in July and August the sum of $100.00 is so pay-

able, or the said sums are due and payable in full on the last day of the month if no contest is held.

In the event of the postponement of any boxing contest from a date mutually agreed upon in any month, $250.00 is to be paid to the party of the first part by the party of the second part; and provided a later date in the same month or in the first week of the ensuing month may be had, for which the said sum of $750.00 is to be paid as above set forth.

It being at all times understood and agreed that the party of the second part agrees to hold a boxing contest each calendar month, so that if a contest is arranged for a particular day of a month and it is not held during that month or in the first week of the ensuing month, then and in that event the sum of $500.00 in addition to the aforesaid sum of $250.00 is due and payable to the party of the first part, or if no date for a contest is set in a month, then the sum of $750.00, except in the months of July and August when the sum of $500.00 is to be paid to the party of the first part for the aforesaid exclusive right herein given to the party of the second part.

The party of the second part also agrees to pay the State Tax of 5% and the Federal Tax of 10%.

It is further agreed that the party of the second part shall pay the premium of the bond to be given by the Club and the license fee of $750.00. The party of the second part agrees to reimburse the party of the first part for any monies necessarily paid out arising out of a penalty imposed by the Commission for the failure to comply with the rules and regulations of the Commission, or the provisions of the State Boxing Law, or in contesting any such proceeding or action brought by the Commission or any agent or employee of the party of the second part.

It is further understood and agreed that in the event of the party of the first part exercising its

power to terminate this contract, that it shall pay to the party of the second part the pro rata amount of the premium on the bond and license fee for the unexpired term of this contract.

More than one contest may be held in any one month and the sum of $500.00 is payable,—$400.00 in advance as above set forth, and $100.00 on the evening of the contest.

The party of the first part agrees in consideration of the above, to furnish the large hall of the Manhattan Casino, lighted and heated, and with seats, boxes and ring all arranged for a boxing contest, as heretofore used.

It is further understood and agreed that the ticket takers and ticket sellers employed by the party of the second part shall be paid by him and also the contestants and officials, *i. e.*, referee, phycians, time keepers, announcers, ushers, etc., and the necessary gloves and all other expenses incurred in the conduct of said contest shall be paid and furnished by the party of the second part.

It is further agreed that each contract or agreement made with contestants, officials, ticket sellers and other help employed by the party of the second part, shall specifically provide that payments of all moneys shall be made by the party of the second part and that he shall be solely responsible.

All dates for conducting boxing shows must be mutually agreeable to the parties hereto.

This contract shall remain in force during the life of the present license held by the Manhattan Athletic Club, Inc., but may be terminated by either party by the giving of ninety days' written notice.

The party of the second part is to have entire charge of the handling and selling of all tickets and shall have exclusive control of all complimentary and press tickets.

This contract is not assignable by the party of the second part.

It is hereby mutually agreed between the parties of the first part and the parties of the second part of this contract that the parties of the second part agree to deliver or to give to the parties of the first part as many complimentary tickets as is consistent with the amount permitted by the rules and regulations of the Boxing Commission of the State of New York, inclusive of three balcony boxes (two end—East side—one center) and one ring side box."

(Transcript, pp. 82 to 86.)

(R., pp. 47 to 49.)

Boxing exhibitions or contests were held by the Central Manhattan Boxing Club., Inc., during the running of this contract, on the following dates: February 28, March 10, March 24, March 31, April 13, May 3 and May 19, 1921, and it is for the alleged failure of defendant to account for and pay the taxes on "admissions" to said exhibitions that the indictment was brought.

THE INDICTMENT.

Counts 1, 2 and 3 (R. pp. 2-4) cover one exhibition or contest held in the month of February, with admissions of $6,180 and tax of $618. Counts 4, 5 and 6 (R. pp. 4-5) cover three exhibitions held in March, with admissions of $29,373 and tax of $2,937.10. Counts 7, 8 and 9 (R. pp. 6-7) cover one exhibition held in April, with admissions of $19,981.90 and tax of $1,998.10. Counts 10, 11 and 12 (R. pp. 7-8) cover two exhibitions held in May, with admissions of $8,505 and tax of $850.50.

The pleader in Counts 1, 4, 7 and 10 charges that defendant *"wilfully failed and refused to account for and pay over"* the sums of money due *as an excise tax* to the United States on the amount of money received as admissions paid to said exhibitions.

Counts 1, 4, 7 and 10 are based on alleged violation of Section 1308 (b), which is as follows:

> "(b) Any person who *wilfully refuses* to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or times required by law or regulation, or who wilfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than $10,000.00 or imprisoned for not more than one year, or both, together with the costs of prosecution."

In counts 2, 5, 8 and 11 the defendant is charged with having *"failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in payment of admissions to said exhibitions."*

Counts 2, 5, 8 and 11 are based on alleged violation of Section 1308 (a), which is as follows:

> "Sec. 1308. (a) That any persons required under Titles V, VI, VII, VIII, IX, X or XII, to pay or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, *who fails* to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than $1,000.00."

In Counts 3, 6, 9 and 12 he is charged with having *"unlawfully, knowingly and wilfully embezzled"* the sums of money representing the tax on admissions to the said exhibitions.

Counts 3, 6, 9 and 12 are based on alleged violation of Section 47 of the U. S. Penal Code, which is as follows:

> "Section 47. Whoever shall *embezzle*, steal or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

FACTS.

The proof tends to show that the Central Manhattan Boxing Club, Inc., was a corporation organized by Frank C. Hayden, Esq., a New York lawyer, with incorporators, stockholders, directors and officers selected or appointed by him personally (R. p. 23): that Hayden ran all the affairs of the Club without having his acts authorized or given corporate sanction. Hayden represented the Manhattan Casino and the Manhattan Athletic Corporation of America, Inc., respectively the owner and lessee of the premises on which the exhibitions were held. The Central Manhattan Boxing Club, Inc., was organizd by Hayden to take the lease and to procure a license from the New York State Athletic Commission to conduct boxing contests, a corporation being necessary to secure a boxing license as the law of the State of New York prohibited issuing such a lease to an individual. Johnston was made match-maker of the Club and entered into a contract in which he is designated as match-maker, agent and manager, and in that contract with the Central Manhattan Boxing Club, Inc., the amount of money which the Club was to receive and the number of contests to be held each month is set forth (R. pp. 47-49). Johns-

ton had no other status than that of match-maker, agent and manager of the boxing affairs of the Club, and was not an incorporator, stockholder, officer, director or employee. It further appears that one Joseph O'Brien acted as assistant treasurer of the Club with the consent of Hayden and the appointment was made on the authorization of Hayden (R. p. 18). Hayden not only authorized the designation of O'Brien to act as his assistant treasurer, but he actually recognized him as such in conducting the business of the Club with respect to the moneys to be paid to the Club and the Club's relations to the fights being held under its license. It is clearly shown in the proof offered at the trial of this case, that the Central Manhattan Boxing Club, Inc., made all reports as to moneys collected, admissions paid and free tickets to the State authorities and paid the 5% State tax due; that the Central Manhattan Boxing Club., Inc., conducted and ran the fights under its license and was the responsible party to the State Athletic Commission of New York.

The statement of the case set forth in the brief filed on behalf of the United States in so far as showing the charges upon which the defendant was tried and convicted and the course of the case through the various courts is substantially correct, and it is also true that no evidence was offered on behalf of the defendant. The statement is not correct as to the relations between the defendant and the Central Manhattan Boxing Club, Inc. It is stated in the Government's brief that the defendant was to pay to the Central Manhattan Boxing Club, Inc., a certain fixed sum as rent per month for the use of the Manhattan Casino and at no place in the contract between the parties is

the word "rent" used. In fact, the use of the word "rent" or of any language that would seem to create the relation of landlord and tenant appears to be studiously avoided. It is not true that the defendant conduced the boxing contests set forth in the indictment on his own behalf but did so as the "agent, matchmaker and manager of the Central Manhattan Boxing Club, Inc." (R. p. 47). In the statement of the case the Government is again in error where it is related on page five that the "defendant appointed as his assistant one J. M. O'Brien," who assumed (without any authority from the director) the title, assistant treasurer of the Club. This treasurer was not appointed without the authority of Frank C. Hayden, president of the Central Manhattan Boxing Club, Inc., but under his direct authority O'Brien was made assistant treasurer (R. p. 18). The United States contends that but two questions are involved in the case presented, and these will be first discussed in this brief. The following points will then be urged on behalf of the defendant:

POINTS OF LAW.

1. The indictment was fatally defective in that it wholly fails to charge any offense against the laws of the United States.

(A). The indictment fails to charge or set forth that there was any relation, contractual or otherwise, between the defendant and the Central Manhattan Boxing Club, Inc., which would render the defendant liable under the law to collect or make return of or pay over the taxes in question.

(B). Counts 1, 4, 7 and 10 are fatally defective for the following reasons:

(1). They fail to charge that the defendant either refused to collect the tax or that he retained the tax and refused to account for and pay over said tax.

(2). They allege that he collected the admission fees paid and erroneously charged it was considered excise tax on the same admission fees which he failed and refused to account for or to pay.

(3). They charge that he failed and refused to account for or to pay over certain sums, but wholly fail to allege—

(a) To whom.

(b) Where the tax was to be paid or when such payment or accounting must be made.

(C). Counts 2, 5 8 and 11 are fatally defective for the following reasons:

(1). They charge that the defendant failed to make a return of the "amount collected by him in payment of admissions" when no such duty is imposed by the Statute.

(2). They charge that the defendant failed to make return "to the Collector of the District in which the principal office or place of business is located," and merely charge that he failed to make a return "to the Collector of Internal Revenue of the United States."

(3). They charge that the defendant failed to make a return of the amount collected by him in payment of admissions but failed to allege when or where such return was to be made.

(D). Counts 3, 6, 9 and 12 are wholly defective for the following reasons:

(1). They fail to allege that defendant "*feloniously*" *appropriated* or converted the several sums to his own use.

(2). They fail to allege or set out—

(a) Any sort of agency, stewardship, or fiduciary relationship under which defendant acted and received the money, or

(b) That the money was entrusted to him and the purpose for which it was entrusted.

(c) The refusal of defendant to pay the money over to the United States.

2. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the Government and in permitting the witness Frank C. Hayden to testify over the objection of the defendant.

3. The money which the defendant is charged with having embezzled in Counts 3, 6, 9 and 12, was not money of the United States, but was simply money due the United States.

4. There was a fatal variance between the allegations of the indictment and the proof in that the Statute, in each count, charges that the boxing contests were conducted by the defendant, while the proof shows that they were all conducted by the Central Manhattan Boxing Club, Inc., under its charter and license from the State Athletic Commission.

5. The defendant was under no duty or obligation, nor was he one of the "persons" charged with the duty to pay, or to collect, account for, or pay over any tax or to make any return or supply any information for the purposes of computation, assessment, or collection of any tax under the provisions of the Revenue Law and particularly Title VIII of the Revenue Act of 1918.

6. The Court erred in failing to direct the jury to acquit at the close of the case as requested.

ARGUMENT.

The right of the Court to grant a writ of certiorari to the defendant in a criminal court is not denied by this defendant, for the reason that the Court has already acted and granted the writ, but it is contended on behalf of the defendant that the case presented is merely a moot one, for the reason that the mandate of the Court of Appeals directing a dismissal of the indictment has already been filed and become a matter of record on the dockets of the United States District Court before whom the defendant was tried and convicted.

The Government contends that the organization and incorporation of the Central Manhattan Boxing Club, Inc., was merely a subterfuge to permit Johnston to procure a license to hold boxing contests in New York City. This position is hardly sound, as it is hardly probable that Johnston would have permitted the Club to be run by Hayden with all the members of the board and the stockholders personal friends of Hayden's selected by him (R. p. 23), Johnston thus being without any opportunity to be heard through representation on the board of directors. But again, if it be assumed that Johnston did organize the Club and that the Club was run for his personal convenience, why can it not be equally and as forcibly assumed that Hayden was Johnston's attorney in all matters relating to the Club and that all the facts to which he testified at the trial of Johnston were privileged communications and information obtained by him while acting as attorney for the defendant. It is not true and the Record will not bear out the statement that it was "understood by all parties" that the contract between the Central Manhattan Boxing Club, Inc., and

Johnston was a lease under which Johnston was to pay to the Club a specified cash rent and the Record, pages 19 and 20, fails to bear out the Government's contention in that respect.

Whether or not Johnston agreed with the Club that he would pay both State and Federal taxes, and the Record shows that he did so agree (R. p. 48), the United States was not privy to this contract and on that assumption of responsibility alone the Government seeks to hold him liable for the collection of taxes under the Statute. In order to sustain the conviction in this case the Government cannot merely prove what was agreed to be done by the parties to the contract to which it was not privy, but must prove beyond reasonable doubt that Johnston did actually receive the moneys and did such other things as alleged in the indictment or required to be alleged in the indictment under the Statute. It is clearly a fact that he is under obligation to the Club, in addition to paying $750.00 per month, to pay all State and Federal taxes, but it does not mean that he was to pay them to the Government or that he was to collect them, but that he was merely to pay a sum equal to the State and Federal taxes to the Club. Certainly the Club cannot relieve itself of its responsibility to the United States by merely contracting with a third party that the third party will perform the obligations of the taxpayer and collector of taxes to the United States. Would it be seriously argued or contended by the Government in this case that the Central Manhattan Boxing Club, Inc., can by any contract relieve itself of accountability for these taxes or that an action to recover the taxes could not be maintained in a civil action? It is respectfully submitted that the

suggestion that such a proposition is tenable is ridiculous. And yet, if the Government's contention that Johnston is liable by reason of this contract to the United States for the collection and payment of these taxes, then by the same token the Central Manhattan Boxing Club, Inc., could not be held civilly or criminally liable.

It is further submitted that the learned Judge of the Circuit Court of Appeals was not compelled to rely upon the fact that the law of the State of New York recognized the Club alone as the only proper licensee to hold boxing contests in order to hold that Johnston could not be held liable for State taxes, for the reason that there is abundant evidence in the record that an officer of the Club, that is, the assistant treasurer, Joseph O'Brien, collected and handled all the money paid in at the box office by spectators at the boxing contests held by Johnston as match-maker of the Club (R. p. 14). Again it is clearly shown that the Central Manhattan Boxing Club, Inc., through its president, Frank C. Hayden, had entire charge of the receipt of the moneys, Hayden testifying as follows: "The Central Manhattan Boxing Club, Inc., as a corporation, and any of the affairs of that corporation or the *receipt of moneys,* I had entire charge of that; but so far as the *conduct* of these bouts was concerned, and all communications which were directed to the Club were given to Johnston" (R. p. 19). If it be required to show further that the Club itself was concerned not only with the collection of money agreed by Johnston to be paid to it under the contract, but also with making tax reports and returns, reference to the record (R. pp. 21 and 23) would show that Hayden, acting for the Club, handed the reports to the State Athletic

Commission within two days after the first bout. He testified as follows: "I superintended that myself, and E. O. Smith as secretary signed that statement, and it was brought to the Commission by myself personally —I had to go there."

Counsel for the United States lay great stress on the proposition that Johnston was under a duty imposed by a written contract to make the returns and pay the tax even if he was not a lessee of the place where the boxing contests were held and it is respectfully submitted that both these propositions fall and fail because, in the first place, the United States was not privy to the contract under which Johnston assumed the responsibility of collecting the taxes, and, secondly, that part of the contract was abrogated as soon as Hayden, acting for the Central Manhattan Boxing Club, Inc., *acquiesced* in and *authorized* the appointment of O'Brien as assistant treasurer of the Club (R. p. 18). The Central Manhattan Boxing Club, Inc., through Hayden, its president, not only authorized and sanctioned the appointment of O'Brien as assistant treasurer of the Club, but notified the Collector of Internal Revenue or the Federal "Government Officials" that there was an *assistant treasurer* who had collected the tax moneys (R. p. 24). Certainly, if the appointment of O'Brien as assistant treasurer, and the title itself implies an obligation to collect and handle moneys, the Club, through its proper officer, O'Brien, assumed the obligation to make reports to the Government and to pay over the taxes collected, if any, and thus relieved Johnston of that duty.

If it be held that the Revenue Act of 1918 places the duty of collecting the tax and making the returns upon

the person who collects the admission charges, then there is a total failure of proof to show that Johnston ever collected one penny of admission or one cent of taxes for the United States, or, in fact, that anyone ever collected any tax money for the United States for the bouts held under the license of the Central Manhattan Boxing Club, Inc. Certainly, if it cannot be shown beyond a reasonable doubt that Johnston did collect the tax, then his conviction on any count cannot stand.

The sixth proposition of law advanced by the Government is that the Circuit Court of Appeals erred in holding that the Internal Revenue Bulletins, Volume I, No. 25 (June 19, 1922), page 18, holding that taxes paid by spectators at a theater or other place of amusement was not property of the United States until actually paid into the Government, had the force and effect of law or amounted to a regulation. It would seem that this ruling does not violate the rule laid down in 290 Federal pp. 120-123, that Treasury Decisions addressed to and reasonably adapted to the enforcement of an Act of Congress have the force and effect of law if they be not in conflict with express statutory provisions, as it is one made pursuant to a regulation and is addressed to and reasonably adapted to the enforcement of the Revenue Act of 1918.

The mere notice printed upon the back of the Bulletin itself, advising that the information contained therein merely follows the trend of official opinion and is not a Treasury Decision, cannot change the fact that if it is a reasonable interpretation of the law and addressed to and reasonably adapted to the enforcement of an Act of Congress, it can be construed as having the force and effect of a law whether it be termed a Treasury Decision or not.

Under point eight the Government seeks to sustain the ruling of the trial court in overruling the objection made and Hayden's testimony, on the ground that he was Johnston's attorney and that his testimony necessarily involved a divulgement of privileged matter, but the statement of facts upon which the Government relies is erroneous and cannot be sustained by reference to the Record. There is nothing in the Record to show that Hayden was not acting as Johnston's counsel at any time except at the time the contract was signed and then only his statement and certainly this cannot, by any stretch of the imagination, be extended to cover the period covered by the indictment or the negotiations leading up to the signing of the contract. Indeed, Hayden testified, as a matter of fact, that he had represented Johnston as his attorney (R. p. 16), and the Record will not bear out the statement that the testimony given by Hayden was not knowledge gained by him as attorney for Johnston.

He was not a financial supporter of boxing contests and the Record is barren of any such evidence. How can it be said that Hayden was not representing Johnston in the making of the contract and not carrying out all the purposes for which the corporation was organized as Johnston's attorney when he himself testified that the corporation of which he was president and the directing head, that is, the Central Manhattan Boxing Club, Inc., was incorporated at Johnston's expense and for the purpose of getting a license to enable Johnston to conduct boxing contests, that Johnston paid the costs of incorporating, paid the license fee of $750.00, paid the costs of the bond which the corporation was obliged to enter into, and that the only reason the corporation was organized and

formed was that Johnston could get a license for the operation of a boxing club (R. p. 15). Can it be said that Hayden was not Johnston's attorney all of the time, that he was acting merely as a patron of the sport of boxing and, if so, why was he handling all the affairs of a corporation which he himself testified was organized by him to aid Johnston in having a license to hold boxing contests? Why is he accepting moneys from Johnston for organizing the corporation and why is he handling its affairs? We submit that the answer can be but one thing. That Hayden was Johnston's attorney during all the period covered by the indictment and for sometime prior thereto.

Further and beyond all this, the Government's contention that no confidential communications ever appeared to have been made to Hayden by Johnston and that a large part of the information imparted by Hayden on the witness stand was not derived from Johnston, or if he did learn anything from Johnston it was communicated to him in the presence of or with the knowledge of other persons, directors of the corporation, witnesses to the contract, etc., cannot be sustained by reference to the Record as no opportunity was given counsel for the defendant at the trial to do more than make the objection to Hayden testifying on the ground that he was divulging confidential matter that came to his knowledge by reason of the relation of attorney and client, for the Court immediately ruled flatly on the proposition of law that "the Government is not bound by that. That rule obtains in civil controversies. Of course, the Government, in a criminal prosecution, is not bound by that rule at all. The objection is overruled." (R. p. 12.) It is respectfully submitted that no opportunity was ever given counsel

to determine whether or not any or all of the testimony of Hayden was not matter within his knowledge by reason of communications made to him by the defendant Johnston, at a time when the relation of attorney and client existed between witness and the defendant, and at no place in the Record of Hayden's testimony is there any word to contradict this proposition or to sustain the proposition of the Government that the matter testified to was not obtained from Johnston or, if so, was communicated to Hayden in the presence of or with the knowledge of others.

I.

The indictment was fatally defective in that it wholly fails to charge any offense against the laws of the United States.

A.

It is not conceivable that a person or corporation owing a duty under the Revenue Law to collect and pay taxes to the Government can by contract shift that duty or obligation to another so that such other will be obligated to the Government and liable civilly and criminally for failure to carry out such contract. Such a contract may properly be made by the parties, but if made it is their responsibility as to its faithful performance. If A were proprietor of a theater, duly licensed and doing business, there is no reason why he should not, for reasons of his own, contract with B to operate the theater, under his license, and pay him a fixed sum weekly or monthly and in addition provide that B pay license, fees, fixed charges and expenses of entertainment and all State and Federal taxes. That was exactly what was done in this case.

But can it be said that by this contract A is relieved of liability to the Government either as to the collection or payment of the taxes and that the Government must look to B for satisfaction? To answer in the affirmative would be to open the door to fraud and permit a responsible party with property to substitute a totally irresponsible party in his stead and thus defraud the Government of large sums of money. But, assuming that the arrangement made by contract in this case absolved the Central Manhattan Boxing Club, Inc., of liability and imposed it on defendant, or, going further, that the arrangement made imposed on defendant the duty to collect, account for and pay the taxes and imposed on him the criminal liability without releasing the Central Manhattan Boxing Club in any way, and assuming that the assistant secretary-treasurer of the Club, appointed by Mr. Hayden, was the agent and representative of defendant, and in collecting or failing to collect the taxes in question he acted for defendant, the indictment presents no such theory and charges no facts upon which such a theory can be predicated.

We insist that by no argument or pleading, however ingenious, can defendant be held under the facts in this case to liability, civil or criminal, under the revenue laws. Even if it were shown that he actually and in fact personally collected the tax under the contract, he could not be held under the indictment in this case, for no such theory is presented and no allusion to such a contract or arrangement is made. He is charged as though he held the exhibitions as principal and there is no reference made to the Central Manhattan Boxing Club, Inc., or to any contract with that Club.

The Government and the Trial Court appreciated the essential importance of proving the contract (Exhibit 1), without which they had no possible theory on which to submit the case to the jury. The failure to plead the contract or charge the facts upon which the Government relied to support such a theory, we submit, renders the indictment a nullity.

B.

Counts 1, 4, 7 and 10 are fatally defective for the following reasons:

(1) The indictment in counts 1, 4, 7 and 10 attempts to charge a violation of Section 1308 (b). These counts, except as to dates and amounts, are identical and as all are characteristic and illustrate the defects and faults complained of, we will set out and address ourselves to count 1, which is as follows:

> "That heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this Court, James J. Johnston unlawfully, knowingly and wilfully failed and refused to account for and pay over to the United States the sum of $618.00 being the amount of excise tax due and payable to the United States under the provisions of Title VIII of the Act of February 24, 1919, known as the Revenue Act of 1918, upon money received by the said James J. Johnston in payment of admissions, the said offense being more particularly described as follows:
>
> That on February 28, 1921, the said defendant conducted a boxing contest in the building known as the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, *and collected the admission fees paid by persons*

attending the said contest amounting to the sum of $6,180.00, and there was due to the United States under the provisions of the Revenue Act of 1918, upon the aforesaid amount as a tax thereon the sum of $618.00, and the defendant has 'unlawfully, knowingly and wilfully' failed and refused to account for or pay over the said sums; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sections 800, 802, and 1308 of the Internal Revenue Law.)" (Italics ours.)

Section 800 of the Revenue Act of 1918, as it applies, is as follows:

> "That from and after April 1, 1919, there shall be levied, assessed, collected and paid, in lieu of the taxes imposed by Section 700 (old act) of the Revenue Act of 1917—
>
> (1) A tax of 1 cent for each 10 cents or fraction thereof paid to any place for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying such admission."

Section 802 is as follows:

> "That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of tax imposed by section 801. In all the above cases returns and payments

of the amount so collected shall be made at the same time and in the same manner provided in section 502 (5513 herein)."

These sections provide (a) that *all persons that pay and secure admission* to any place where admissions are charged shall pay, in addition to admissions, a tax of 1 cent for each 10 cents or fraction thereof paid for admission, or (b) that, being admitted free to any place where admissions are charged, "*the person so admitted*" shall pay the amount of the tax and that in both instances the tax shall be collected by the person receiving any payments for admission or who admits any person free, and (c) that returns and payments of the amounts so collected shall be made as provided in Section 502. (Italics ours.)

Section 502 is as follows:

"That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under paragraph two of section five hundred and one *to the Collector of Internal Revenue of the district in which the principal office or place of business is located.* Such returns shall contain such information, and be made in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe." (Italics ours.)

It will be seen that it is the duty of the person securing admissions to pay the tax and the duty of the proprietor to first collect the tax and then pay it over to the Government. He is penalized by the Act, Section 1308 (b), if he fails to do either. *He cannot pay it in the first instance. He must collect it from the persons securing admissions, whether paid or free,* and it is not a tax on admissions paid but is a tax on "admissions" based on the price of the tickets, whether paid or free, by which "admissions" are secured. (Italics ours.)

In the counts under discussion (1, 4, 7 and 11) the indictment charges (1st) that the defendant wilfully failed and refused to account for the amount of *excise tax* due and payable to the United States upon money received in payment of admissions, and (2nd) that he collected the admission fees paid by persons attending the contest, amounting to $6,180, and that there was due the United States as a tax thereon the sum of $618, and that he wilfully failed and refused to account for or pay over said sum. All that can be said of this count of the indictment is that it charges that an exhibition was held at which $6,180 was collected in admissions and that there was due the United States *as an excise tax* thereon the sum of $618, which defendant wilfully failed and refused to account for or pay over. This is true of counts 4, 7 and 10, and in all and each there is a failure to charge that defendant *failed or refused to collect the tax or that he collected the tax and failed and refused to account for and pay it over.* These are the only offenses for which he could be held accountable under the Act.

(2) The law (Secs. 802, 502) provides that return and payment of the tax shall be made "monthly" to

the Collector of Internal Revenue of the district in which the office or place of business is located, and in this case, under the proof, the boxing exhibitions having been held at the Manhattan Casino, the return and payment should have been made to the collector of Internal Revenue of the district in which the casino is located.

But the indictment (counts 1, 4, 7 and 10) is silent as to all this and wholly fails to allege (a) to whom, or (b) where, or (c) when such payments or returns were to be made. It simply charges, in this exact language, that the defendant "*wilfully failed and refused to account for and pay over said sum.*" The supposition is that payments to be made to the United States are generally payable to the Treasury, but that is not alleged. Nor is it alleged to what officer of the Government or in what district payment was to be made.

Last, but of no less consequence is the failure to allege when returns and payments were to be made. The several counts of the indictment set the last day of the month named as the date of the offense of failure to make payment of the tax alleged to be due on admissions paid to contests held in the preceding calendar month, but it is not charged that the law required return and payments to be made on that or any other date. This is the conclusion of the pleader, but he nowhere, and in no way, charges that this was a requirement of the law, and that for failure to make return on or before said date, defendant was guilty of a violation of the Act. Whatever the requirement of the law and any regulations made thereunder, it should be pleaded in order to properly charge a criminal offense and fairly and reasonably advise a defendant of

the nature of the offense he is charged with having committed.

C.

Counts 2, 5, 8 and 11 of the indictment, based on Section 1308 (a) of the Act, charge that defendant "*unlawfully failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in payment of admissions*" to boxing contests. (Italics ours.)

These counts of the indictment, except as to dates and amounts, are identical and so we will set out count 2 for the purposes of this argument. It is as follows:

> "And the grand jurors aforesaid on their oath aforesaid do further present heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this Court, the above named James J. Johnston *unlawfully failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in paymnt of admissions to a boxing contest* conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, City, County and State of New York, on February 28th, 1921, in violation of the Act of February 24, 1919, known as the Revenue Act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contest the sum of $6,180.00 *and in addition thereto the defendant collected $618.00 as taxes on said admissions;* against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided." (Secs. 800, 802 and 1308 of the Internal Revenue Law.) (Italics ours.)

(1) It is here urged that no return "*of money collected * * * in admissions*" to the boxing contest was required under the Revenue Act. What was required was a monthly return *of the amount of taxes collected* and payment of the tax collected to the Collector of Internal Revenue for the district in which the exhibitions were held.

Section 802 provides:

> "In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in section 502 (5513 herein)."

Section 502 provides:

> "That every person, corporation, partnership or association receiving any payments * * * shall collect the amount of the tax, if any, imposed * * * and shall make monthly returns under oath, in duplicate, and pay the tax so collected * * * to the Collector of Internal Revenue of the district in which the principal office or place of business is located."

The only return required by the Act is the return of the amount of taxes collected, as provided in the sections above quoted. Yet the pleader charges and the Court permitted conviction for failure to make a return of the amount of admission fees collected.

As the law required that the tax be collected on all "admissions," paid or free, and as the reports to the New York State authorities (R. 51 to 72) (Government's Exhibits 3 to 18, inclusive) show that a large percentage of the "admissions" were free, it can readily be seen that to report merely the amounts "*of*

*money collected * * * in admissions''* would fall far short of serving any useful purpose. The requirement of the Act was, as stated, to make "returns of the amounts so collected (taxes) at the same time and in the same manner as provided in Section 502."

(2) These counts (2, 5, 8 and 11) are fatally defective in that they fail to allege failure to make a return *"to the Collector of Internal Revenue of the district in which * * * the place of business is located."* They do charge failure to make a return to "the Collector of Internal Revenue of the United States," but this does not satisfy or comply with the requirements of the statute. There are sixty-four Collectors of Internal Revenue of the United States and the same number of districts. The designation of the Collector of the proper district is obviously so essentially vital and its omission so manifestly fatal that argument is superfluous. (Italics ours.)

(3) The indictment also fails to allege where or when the returns were to be made. This point was discussed above under heading "B-2," and as the argument applies with equal force to the counts of the indictment here under consideration, we respectfully refer the Court to the discussion there found.

D.

We are come now to the "embezzlement" counts of the indictment. These counts (3, 6, 9 and 12) are identical except as to dates and the amounts alleged to have been embezzled.

Count 3 is as follows:

"And the grand jurors aforesaid on their oath aforesaid do further present, that heretofore, to wit, on the first day of April, 1921, in the Southern District of New York and within the jurisdiction of this court, the above named defendant, James J. Johnston, unlawfully, knowingly and wilfully embezzled the sum of $618.00, which was then and there money of the United States, in the following manner: to wit, the said defendant conducted a boxing contest on February 28, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $6,180.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the Act of February 24, 1919, known as the Revenue Act of 1918, the defendant collected the sum of $618.00, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contest for admission thereto; *that the said sum of $618.00 was money of the United States and was collected by the defendant under the provisions of said Revenue Act of 1918, for and on behalf of the United States,* and it was the duty of the defendant to account for and pay over the said sum to the United States, *and the defendant unlawfully, knowingly and wilfully failed to pay the said sum to the United States and converted the same to his own use;* against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 47 of the Criminal Code)" (Italics ours.)

The offense of embezzlement here charged is not defined or created by Federal law. Section 47 of the U. S. Criminal Code merely provides that "whoever shall embezzle * * * money of the United States, shall

be fined not more than five thousand dollars, or imprisoned not more than five years, or both." The statute simply adopts and fixes a punishment for the offense of embezzlement at common law.

(1) The pleader in the embezzlement counts further fails to allege in what capacity the defendant came into possession of the moneys in question. The Act of March 3, 1875 (Sec. 47, Penal Code), under which this indictment was drawn, does not define the crime of embezzlement, and as said by Judge Trieber in *United States* v. *Allen*, 150 Fed. 152, it must be deemed by Congress to cover the offense of embezzlement as generally defined by the English and American Courts and statutes on that subject. In this case, the count in question was under the same Act and charged:

> "That he did then and there wilfully, feloniously and unlawfully embezzle and appropriate to his own use in substation 4 of the post office of the United States, located on Main Street, in the city of Little Rock, in the State of Arkansas, three hundred and eighty-three dollars money order funds of the United States of the value of three hundred dollars lawful money of the United States, a more particular description of which is to the grand jurors unknown contrary to the form of the statutes, etc."

The Court said:

> "As this count fails to show that he was an employe or that this money came lawfully into his possession by virtue of some employment, it is clearly bad.
>
> The identical question now before the court, under the same statute, was before the Supreme

> Court in Moore v. United States, *supra,* and it was there held that an indictment failing to allege that such sum came into defendant's possession in the capacity of a clerk or employee, although the indictment charged that he was such a clerk, was fatally defective. That decision is conclusive of this case, and for this reason the demurrer to the first count must be sustained."

In the instant case, there is no allegation of any relation or capacity whatever, nor any allegation that defendant was authorized to collect the taxes for the United States. The pleader does allege "*that the said sum * * * was money of the United States and was collected by defendant under the provisions of the Revenue Act of 1918, for and on behalf of the United States, and it was the duty of the defendant to account for and pay over the said sum to the United States,*" *etc.* But there is no allegation that he was an employee, servant or agent of the United States in the matter of the collection of the money, or that he was authorized to collect it, and the whole allegation is a conclusion of the pleader that he collected the money "*for and on behalf of the United States.*"

The Treasury Department, by Regulation 43-1, Article 35, *supra,* has held that the money collected as admissions tax is not the property of the Government until paid to the Government,and evidently Congress had that in mind when it provided for payment by those who procured admissions, and collection and accounting by the proprietor, with drastic criminal penalties for failure of either to comply with the Act (Sec. 1308-b). Had it in mind the idea of constituting the exhibitor or proprietor of the place of amusement its agent, it

would have included such a provision in the Act and in that event, if the moneys collected as taxes had been stolen as in the case passed upon which brought the ruling just referred to, the United States and not the theater owner would have suffered the loss. It is evident that the Government placed itself in position to at all times call for a full accounting for the money due it under the Act.

Under the facts in this case, defendant was not the proprietor or owner of the place of amusement and, under the law, it was not his duty, as the indictment charges, to collect the admission taxes and pay and account for same to the Government. Whatever responsibility he may have assumed or may have been imposed on him was by virtue of the contract (Government Exhibit 1) and there is no allegation in these counts, or any others, of this contractual obligation, if such can be imposed and be binding on him and the Government.

In *Moore v. United States*, 160 U. S. (1st Cir.) 273, 274, the Court, in passing on an indictment under the same statute, said:

> "'The ordinary form of an indictment for larceny is that J. S., late of, etc., at, etc., in the county aforesaid (specifying the property), of the goods and chattels of one J. N., 'feloniously did steal, take, and carry away.' In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took and carried certain specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcenies of government property. It applies to 'any person,' and uses the words 'embezzle, steal, or purloin' in the same connection, and as applicable to the same persons

and to the same property. There can be no doubt that a count charging the prisoner with stealing or purloining certain described goods, the property of the United States, would be sufficient, without further specification of the offense; but whether an indictment charging in such general terms that the prisoner 'embezzled' the property of the government (identifying it), would be sufficient, we do not undertake to determine; although we think the rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the post office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for property received in a wholly different capacity—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Whart. Crim. L. 1942; Rex v. Snowley, 4 Car. & P. 390; Com. v. Simpson, 9 Met. 138; People v. Sherman, 10 Wend. 298, 25 Am. Dec. 563; Rex v. Prince, 2 Car. & P. 517; Rex v. Thorley, 1 Mood. C. C. 343; Rex v. Bakewell, Russ. & R. 35."

The indictment simply charges that defendant embezzled the sum of $618 in money of the United States in the following manner:

(a) By collecting $618, a tax imposed under the revenue Act;

(b) By unlawfully, knowingly and wilfully *failing* to pay that sum to the United States;

(c) By converting same to his own use.

There is no allegation as to his duty to collect the money or the capacity (whether as agent or employee) in which he collected same.

There is no allegation that he *refused* to pay the money over to the Government. The allegation is that "*the defendant unlawfully, knowingly and wilfully failed to pay the said sum to the United States.*"

There is no allegation that he *wilfully, knowingly, unlawfully or feloniously* appropriated or converted the money to his own use.

All the authorities hold that there must not only be a relation of confidence and trust between the person appropriating property and the owner to constitute embezzlement, but the appropriation must be with a fraudulent intent. The mere breach of contract, or a mere neglect to pay over funds, is not sufficient (*Clark's Criminal Law*, p. 275).

(2) It is here contended that the indictment as to these counts is fatally defective in that it fails to use and employ the word "feloniously" in describing and charging the offense. The Act itself does not define the crime of embezzlement, and for this reason must be deemed to have been enacted to cover the offense of embezzlement at common law, or as defined by the English statutes on that subject. There are no less than twenty different sections of the United States Statutes that create and define the crime of embezzlement (see Index, U. S. Criminal Code), such as embezzlement "of coins by officers of mints," "by Cus-

todians of public property," "of mail matter," etc., and indictments have been sustained as to these statutes which could not have been upheld under the test at common law. But Section 47, upon which the indictment in the instant case is founded, adopts the common law felony of embezzlement and by the terms of the punishment prescribed continues it as a felony under the Federal law and it therefore must be tested by the rules of pleading at common law.

There are no common law offenses against the United States and Federal Courts cannot take cognizance of crimes except such as are created by the Congress (*United States* v. *Greve*, 65 Fed. 487). But when Congress punishes an offense by designation without defining it, the Courts look to the common law for the definition and elements of the offense, and test indictments by the rules and principles that govern at common law (*In re Greene*, 104 Fed. 111; *United States v. Cardich*, 143 Fed. 640, 642-643).

In *United States v. Cadwallader*, 59 Fed. 677, it is held that embezzlement was a common law offense. Blackstone in his Commentaries, Vol. 4, pp. 230-231, defines embezzlement as "the appropriation to one's own use or benefit of property or money entrusted to him by another, such as the embezzlement by clerks, servants, and agents of their employers' money or property." Judge Putnam, in the First Circuit, in *Jewett v. United States*, 100 Fed. (1st Cir.), p. 837, speaks of "embezzlement at common law" in discussing what would be sufficient to charge that crime.

In the case of *United States* v. *Greve*, 65 Fed. 487, Judge Priest, in passing on the question raised in a case of embezzlement of national banking funds, said:

"At this time, and upon the brief consideration I have been able to give the subject, I am not prepared to hold that the indictment must charge that the embezzlement or conversion was felonious. *It would unquestionably be the safest practice. It is seriously debatable whether an indictment omitting that word or its necessary and full equivalent is not defective.* The federal courts, it is true, do not deal in their criminal jurisdiction with common law offenses. They only recognize such as are created and defined by Congress within its constitutional authority. However, in the enactment under consideration, Congress has employed the word 'embezzlement,' and being technical, it must bear in the context that technical signification which it has usually borne, and if it be a complex or component word, comprehending in the form of definition an offense, in charging such an offense by indictment the several elements must be separated, and specifically averred. Embezzlement, in its technical sense, and with respect to such punishment as the statute under consideration prescribed, most usually means a felonious appropriation by a servant of his master's property while it is in his keeping; and 'feloniously' means with a deliberate intent to do a wrongful act. It is true, the indictment here charges that the embezzlement was done with 'the intent then and there to injure,' etc., but this does not express precisely the same meaning as 'feloniously,' because in the latter the element of deliberation is embraced. There would be no tautology in using both expressions." (Italics ours.)

The distinguished jurist who rendered that opinion was passing on a statute which created an entirely new and distinct offense, and it is evident that the serious doubt he expressed as to sufficiency of the indictment in that case would have been a settled conviction had

he considered the same question under Section 47 of the Penal Code.

In the case of *United States v. Staats*, 49 How. 41, 12 Law. Ed. 979, where the exact point was raised and at issue, it was held that in *all felonies at common law*, the felonious intent is an essential ingredient of and descriptive of the crime. In this case the Court said:

> "In all cases of felonies at common law, and some, also by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adherred to with great strictness; and properly so, where this intent is a material element of the crime.
>
> This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim, or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses."

Again, in the case of *Bannon & Mulkey* v. *United States*, 156 U. S. 464, the same point was at issue and the Court clearly distinguished between crimes created by statute and those which at common law were felonies and said (1st Cir.—p. 467), in speaking of the ruling of the Court in *United States* v. *Staats, supra,* that:

> "In the opinion it was admitted that in cases at common law, and some also by statute, the felonious intent was deemed an essential ingredient, and the indictment would be defective, even after verdict, unless such intent was averred."

And again, in *Myers v. United States,* 256 Fed. 779, the Circuit Court of Appeals (5th Cir.) holds to the distinction as between offenses created by statute and those at common law.

The weight and reason of all the authorities which have any application is that offenses not created by statute must be charged in language which fully covers every essential ingredient of the offense. Felonious intent is essential to all common law felonies and particularly so to larceny and embezzlement because of the very nature of the crimes and the possibility of innocent taking or appropriation. It cannot be argued that the use of the words "unlawfully, knowingly and wilfully" are the equivalent of "feloniously," for they are not used in connection with the conversion which is the gravamen of the offense. They are employed in connection with the alleged failure to pay the money to the United States, which does not constitute the crime charged.

The crime of embezzlement under Section 47 is a felony and if due regard and weight is to be accorded the case of *United States* v. *Staats, supra,* the indictment must be held fatally defective because of the omission to charge that the act of embezzlement was feloniously done.

II.

The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the Government and in permitting the witness Frank C. Hayden to testify over the objection of the defendant.

A.

It is first urged that the Court erred in admitting the contract (Government Exhibit 1) in evidence over the objection of the defendant (R., pp. 12-13). The purpose of the contract was to fasten on defendant some responsibility for the collection of taxes on admissions to the boxing exhibitions given and held in the name of the Central Manhattan Boxing Club, Inc., under its charter and license. It was impossible to show that defendant held any such exhibitions and therefore impossible to show that as exhibitor (the person contemplated by the statute) he was responsible to the Government for the collection of the taxes paid by persons admitted. To overcome this, counsel for the Government, the witness Hayden and the Trial Court ably and zealously collaborated and worked to make such a connection. The indictment was silent as to existence of the Central Manhattan Boxing Club and silent as to the existence of a contract of any kind. It failed to allege the existence of such a relationship between the Club and defendant as was sought to be established by the contract. We have no record of what was said in the opening statement of counsel for the Government, but as soon as the witness Hayden developed the fact *that there was such a thing as the Central Manhattan Boxing Club, that it conducted the boxing contests, and*

that the defendant was its "matchmaker" (fols. 65, 68), the Court immediately asked: "What was his relation?" The witness thereupon undertook to define the relationship of the two under the contract; in other words, to interpret the contract (R., p. 12). It was then admitted over the objection of the defendant (R., p. 12). Throughout the examination of this witness the labor was to shift the responsibility on defendant, and to "cap the climax" the Court asked this question: "Under this contract, as I understand it, Johnston had full control?" and the witness answered: "Absolutely; we had nothing to do with it at all."

We, who are on this brief, have labored assiduously to find some precedent directly in point but without success and it must be because of the fact that never before in the history of criminal jurisprudence has there been such a departure from the rudimentary principles of evidence in the conduct of a case. The veriest tyro in the law knows that evidence must conform to the pleadings in a case and that the rule is even more rigidly applied in criminal cases than it is in civil proceedings. Yet, without pleading the facts or even an allegation of ultimate fact or conclusion of law, this contract between private parties was permitted to go into evidence to establish a criminal liability. The error was egregious and would if sustained establish a dangerous precedent in the trial of the citizen for his liberty.

B.

At page 12 of the record, objection was made to the further testimony of the witness Hayden on the ground that to permit it would be violating a confidence as to

the knowledge that came to him by reason of the professional relation of attorney and client existing between the witness and defendant. To this objection, the Court in ruling said:

> "The Government is not bound by that. That rule obtains in civil controversies. *Of course, the Government, in criminal prosecution is not bound by that rule at all.* The objection is overruled."

The objection was timely. It came at a time when the witness was undertaking, and was later permitted to testify to the relation of defendant to the Central Manhattan Boxing Club. Later (R., p. 16) he testified that he was attorney for the Manhattan Athletic Club, the Central Manhattan Athletic Club, the Manhattan Casino, and defendant. Obviously, he could have testified, without prejudice, to many things under a proper ruling of the Trial Judge and would have been prevented from testifying as to those matters that came to his knowledge through his employment by defendant. This would have excluded much of the most damaging testimony given by the witness, as we will presently attempt to show. But the ruling of the Court precluded such a practice. It was a complete and sweeping denial of the right of a defendant in a Federal Court to enter any objection to the introduction of privileged communications growing out of the relation of attorney and client. Further insistence or repeated objections on this score would have been useless and might properly have invited the reprimand of criticism of the Court—a thing counsel always tries to avoid, not only to spare his own feelings but to avoid prejudice to his client's cause.

It has been difficult for us to understand this ruling by a judge of the ability of Judge Van Fleet and we are of necessity forced to re-examine and present the Federal cases to fortify our understanding of the law.

In the case of *Lew Moy v. United States,* 237 Fed. 50, the defendant interposed an objection to the testimony of a lawyer to whom he had gone for the purpose of engaging him professionally and who declined the employment. The Court, among other things, said:

> "Whatever was in Mr. Clark's mind, the situation was peculiarly one inviting Hee's trust and confidence. Mr. Clark was an attorney at law, practicing in the state where the trial was to be had. It was properly desirable for defendant Hee, who lived in a distant state to have the aid of local counsel, especially Mr. Clark, who was already counsel for one of his co-defendants. The subject of their conferences was manifestly of a character covered by the immunity from enforced disclosure. The statements made were not by way of confession, nor in casual discourse with an outsider. In questions of this kind consideration should be given to the attitude, the intent and belief, of the person seeking advice or assistance. For example, communications have been excluded when made to a detective who falsely pretended to be an attorney at law. People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. See also State v. Russell, 83 Wis. 330, 53 N. W. 441.
>
> Communications made in good faith to an attorney at law for the purpose of obtaining his professional advice or assistance are privileged. The payment of a fee is not essential. Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954. Nor does it matter that after the communications the attorney declines to act. Strong

v. Dodds, 47 Vt. 348; Sargent v. Hampden, 38 Me. 581; Thorp v. Goewey, 85 Ill. 611; Cross v. Riggins, 50 Mo. 335; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848. There is some diversity of opinion upon this question, but the above is better sustained by sound principle. It is in accord with the common custom of those who seek professional advice. The man who goes to the lawyer does so as a client, and the lawyer who listens to him does so professionally. The communications preliminary to actual retainer or engagement are frequently necessary, and they should be unconstrained and without apprehension of disclosure. That this should be so is of public interest, and is essential to the intelligent and honorable practice of the law. Various obstacles to a definite contractual relation may appear from the communications—prior inconsistent duty to others, ethical professional standards, time and opportunity, disagreement as to compensation, and so on—but generally the preliminary conference must be had, and the disclosures made are within the spirit of the immunity. The fair and reasonable operation of the admitted general rule requires that liberality of construction."

In the case of *York v. United States*, 224 Fed. 88, the Court said:

" 'The general rule,' said Mr. Justice Story in Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474, 'is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even

if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is whether the question did involve the disclosure of professional confidence.' And that is the question in the case at bar. Indispensable elements of a privileged communication between attorney and client are: (1) The professional relation of attorney and client at the very time the communication is made (Harless v. Harless, 144 Ind. 196, 41 N. E. 592, 594; Brady v. State, 39 Neb. 529, 532, 533, 58 N. W. 161; Farley v. Peebles, 50 Neb. 723, 728, 70 N. W. 231; Turner's Estate, 167 Pa. 609, 610, 31 Atl. 867); (2) the making of the communication on account of that relation (Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474); and (3) the necessity or relevancy of the communication to the subject-matter of the attorney's engagement, in order to enable him to use his ability, skill, and learning in the discharge of his office of attorney in relation thereto. 1 Greenleaf on Evidence (16th Ed.) 244; Jones on Evidence (2nd Ed.) 751; Denunzio's Receiver v. Scholtz, 117 Ky. 182, 77 S. W. 715, 716, 4 Ann. Cas. 529."

The cases quoted from and cases cited in the opinions all jealously guard any confidence given to an attorney under circumstances which show the existence of a professional relation or the anticipation of one. The only relaxation from the rule we are able to find is that where the confidence is given or advice is sought with the intention of committing a crime or in cases where third parties were witness to what occurred.

In this case, because of the total denial and repudiation of the right to invoke the rule in a Federal Court, we have nothing to guide us as to what testimony of the witness would or would not have been excluded by its proper application. Certainly, the inferences can-

not be charged against the defendant. By all rules of justice and right, they should be broadly and liberally applied in his favor. The fact that no one can tell what harm befell him by such a ruling is sufficient in furtherance of justice to warrant the reversal of the case, if no other reason appears in this record. The vicious, voluntary statement he made following a ruling of the Court (R., p. 25), that "Johnston and his assistant sold the tickets and collected the tax," which is the only thing that indicated that the tax was collected by them, or either of them, illustrates most forcefully the injury that may have been done by the ruling. It may be urged that he had other sources of knowledge and ways of finding this out. But there is nothing to show that he did. In fact, he says (R., p. 14) that all his money transactions were with O'Brien. Again (R., p. 19), he said: "*Well, the Central Manhattan Boxing Club, as a corporation, in any of the affairs of the corporation or the receipt of moneys, I had charge of that; but so far as the conduct of these bouts were concerned and all communications which were directed to the club, they were given to Johnston.*" And in his letter (defendant's Exhibit A, R., p. 24), he says over his signature: "the taxes were collected and paid to the assistant treasurer and matchmaker and the moneys if not paid are still held by them." If this statement is true, the Club and not O'Brien or Johnston, collected the taxes. But more to be criticized is his testimony as to the relations of Johnston and O'Brien. He was permitted to testify throughout that O'Brien was the agent or assistant of defendant and this information he could not have acquired except from defendant. The Court on objection refused to let him testify that O'Brien told him that he was the agent of defendant (R., p. 15).

This, of course, was the proper ruling, but throughout he spoke of O'Brien as the agent or assistant of Johnston and both he, the District Attorney, and the Court stressed that relationship. It was a necessary thing to establish and well appreciated by these three able lawyers, the District Attorney, the Trial Judge and the witness.

We insist it was improperly done for the reasons here urged and for the further reason urged elsewhere, that without the necessary allegations of such a relationship in the indictment, or the existence of such a contract, the proof was wholly incompetent, irrelevant and immaterial.

III.

The money which the defendant is charged with having embezzled in counts 3, 6, 9 and 12, was not money of the United States, but was simply money due the United States.

Courts take judicial notice of the regulations of departments charged with the administration of Acts of Congress, and in the absence of judicial interpretation, give such regulations controlling weight (*John F. Malley, Collector, v. Walter Baker & Co.*, 281 Fed. 41). The Court in that case said:

> "But it is elementary that, if ambiguity is found in a statute or when it is necessary to determine a fact upon which the operation of a statute is made to depend, the regulations made by the department charged with the administration of the Act are to be given great, sometimes practically controlling, weight.
>
> See Edwards, Lessee, v. Darby (12 Wheat. 206, 212; Houghton v. Payne (194 U. S. 88, 96); Ko-

mada v. United States (215 U. S. 392; Jacobs v. Pritchard (223 U. S. 200, 214); Houston v. St. Louis Independent Packing Co. (249 U. S. 479); Noble v. Union River Logging R. R. Co. (147 U. S. 165; Coopersville Co-op. Creamery Co. v. Lemon (163 Fed. 145); United States v. Healey (160 U. S. 136, 141); Robertson v. Downing (127 U. S. 607, 613). Cf. American Casualty Co. v. United States (251 U. S. 342, at 349), where the court, by Mr. Justice Clarke, said:

'It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provisions.' Citing United States v. Grimaud (220 U. S. 506); United States v. Birdsall (223 U. S. 233, 251); United States v. Smull (236 U. S. 405, 409, 411); United States v. Moorhead (243 U. S. 607.)"

In respect of the question as to the ownership of money collected as taxes on admissions, the Treasury Department has decided that, until the tax has been paid to the Collector of Internal Revenue, the tax is not the property of the United States.

This regulation is found in Internal Revenue Bulletin, Vol. I, No. 25, issued June 19, 1922, at page 18, and is as follows:

"TITLE VIII.—TAX ON ADMISSIONS AND DUES.

Collection, Return, and Payment of Tax.

Section 802, Regulations 43-1, Article 35: Duty to collect, return, and pay tax. I-25-360, S.T. 377.

Inquiry has been made whether theater admissions tax in the amount of $112.15 included in a

larger amount stolen from the safe of a moving-picture theater was the property of the Government so as to relieve the theater owner from payment to the Government of the amount of tax so stolen. It is assumed that the transactions occurred subsequently to January 1, 1922, so as to be governed by the provisions of the Revenue Act of 1921.

Section 800 of the Revenue Act of 1921 imposes a tax on the amount paid for admission to any theater, the tax to be paid by the person paying for such admission. Under the provisions of sections 802 and 502, returns and payment of the tax to the collector of internal revenue are to be made monthly; certain penalties and interest are imposed by those sections for failure to pay the tax when due. Section 1302 provides for the imposition of various penalties for failure to pay, collect, truly account for, and pay over certain taxes, including the admissions tax.

In the opinion of this office, the law imposes upon the theater owner the duty to make returns and pay the tax to the collector of internal revenue. *The obligations so imposed are not complied with until the tax has been so paid. Accordingly, the $112.15 collected as admissions tax was not the property of the Government at the time it was stolen.*"

The sections referred to above are identical with those of the Act of 1918.

Under this regulation, the tax alleged to have been collected by defendant and embezzled by him, in counts 3, 6, 9 and 12 of the indictment, was not property of the United States and the conviction on these counts cannot stand.

But the Court did not look to the law or to the regulations and did not attempt to construe or interpret

them. On the contrary, the Court and the District Attorney took the law of the case from Joseph Steinberg, Deputy Collector. We quote from his examination, without comment (R., pp. 43-44).

"*Redirect examination by Mr. McCoy.*

Q. Mr. Steinberg, when a form of that sort that you have just mentioned is not filed, what does that amount to; is it a violation? A. It would be a violation, positively.

Q. Is it serious?

The Court: Does the law require it, or the regulations?

The Witness: The regulations require it; we would call it a technical violation, and it carries a fine of $10 or so on the part of the party who fails to file it.

Q. But, in any event, the law specifically says, or the regulations specifically say, that the one who collects the tax, actually receives the money, is the one who is responsible for paying that tax? A. Yes, that party would be responsible for the payment of that tax.

Q. Regardless of whether any notice has been given to the Bureau of Internal Revenue, as to whether a lessee is in charge of a building? A. Regardless of that fact.

The Court: I suppose, under the law, as soon as this tax is collected, the tax being a separate thing from the admission fee, as soon as that tax is collected by anyone, it is property of the United States.

The Witness: It is the property of the United States. There are certain taxes to be collected by parties specified under certain sections of the law; in fact, they really become agents of the Govern-

ment for the collection of that tax, and the tax on admissions is one of those. There were several others; for instance, the tax on transportation.

Q. And the luxury tax is another? A. Section 904, I think it is.

The Court: And whoever collects those taxes becomes an agent of the Government?

The Witness: Really become an agent of the Government. That is proven by the fact that if that party is unable to collect the tax, the Government will aid him, and, in fact, collect it for him.

By Mr. McCoy.

Q. But as soon as he collects that tax it never becomes his money, does it, it is always the Government money? A. It is the Government's money. There is a corresponding duty on the part of the party who is paying for admissions also to pay that tax, and if he refuses to pay it he is violating the law. * * *

The Court: But the failure to pay the tax makes the party receiving it responsible to the Government.

The Witness: The party collecting the tax is the one responsible to the Government—now, what is your question, please?"

IV.

There was a fatal variance between the allegations of the indictment and the proof in that the Statute, in each count, charges that the boxing contests were conducted by the defendant, while the proof shows they were all conducted by the Central Manhattan Boxing Club, Inc., under its charter and license from the State Athletic Commission.

The mere statement of this point carries its own argument. Defendant did not, and could not, under the New York State law, conduct a boxing exhibition or contest. Licenses for such exhibitions could only be granted to chartered clubs whose application for license met the requirements of the law and the regulations of the New York State Athletic Commission. The Central Manhattan Boxing Club, Inc., did secure such license on its application Def. Ex. B. (R., pp. 74 to 76), and it, under this license and sanction of the Athletic Commission, not defendant, held and conducted the exhibitions. As "agent, manager and match-maker," defendant could act and the contract contemplated he should so act for the Central Manhattan Boxing Club in the "*conduct of boxing contests * * * under its charter and license held by it for a period of one year.*" At least, he did so act and unless there was some regulation of the Boxing Commission to the contrary, there is no legal reason why such an arrangement could not be entered into and the conduct of the contests delegated to an agent.

But the Club, licensed by the State Athletic Commission, held the contests, reported to the State authorities, paid taxes to the State authorities, and according to the proof, the Club, not defendant, failed to

make reports and returns to the Collector of Internal Revenue. Government Exhibits 3 to 18, inclusive (Record, pp. 51-72), are reports made by it to the Treasurer of the State of New York and the New York Athletic Commission on official forms and they cover each and all of the contests alleged in the indictment to have been held.

Mr. Frank C. Hayden testified (R. p. 11) that the Central Manhattan Boxing Club conducted the boxing contests. It could not have been done in any other way and while it is conceivable that by proper pleading a case might be charged against defendant under the Revenue Act and that the proof adduced in this case supplemented with proof, wholly lacking in this case, that the taxes were in fact collected, might sustain such an indictment.

V.

The defendant was under no duty or obligation, nor was he one of the "persons" charged with the duty to pay, or to collect, account for, or pay over any tax or to make any return or supply any information for the purposes of computation, assessment, or collection of any tax under the provisions of the Revenue Law and particularly Title VIII of the Revenue Act of 1918.

The Central Manhattan Boxing Club, Inc., under the statute, owed the duty to collect the tax and account for same and no delegation of that duty by contract or otherwise can alter the fact or the law.

Section 1308 (d) contemplates holding certain individuals responsible for the obligations of corporations charged with the duty to collect, account for and pay

over the tax provided by Section 800 of the Revenue Act of 1918.

It is as follows:

> "The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Defendant, however does not come within the classification of that section. He was neither "*an officer or employee*" of the Central Manhattan Boxing Club, nor as such "*under a duty to perform the act*" in respect to which the violations occurred.

Neither was the defendant a lessee, which under the regulations of the Internal Revenue Department might bring him in the category of those responsible for the payment of the taxes. Even if it be conceded that the defendant might be properly charged and held responsible for failure to collect and account for taxes for the exhibitions or contests held by the Central Manhattan Boxing Club, Inc., it is urged that the indictment as drafted on which defendant was arraigned and tried does not set forth facts which make him responsible for any of the alleged violations of the Revenue Act.

VI.

The Court erred in failing to direct the jury to acquit at the close of the case as requested.

The proof wholly failed to establish the offenses charged in the several counts of the indictment.

(1) The evidence showed that the Central Manhattan Boxing Club, Inc., not defendant, conducted the boxing exhibitions.

(2) The evidence failed to show that defendant collected the tax in question and failed to make return or pay same to the United States. The inquiry and proof was entirely and exclusively as to the failure of the Central Manhattan Boxing Club, Inc., to make such return and payment.

(3) The evidence as to counts 2, 5, 8 and 11 wholly failed to show that defendant failed to make a return to the proper revenue officer of the amount of admissions collected (although this is no offense), and the inquiry and proof was entirely and exclusively as to the failure of the Central Manhattan Boxing Club, Inc., to make such return.

(4) The money alleged to have been embezzled was not money of the United States.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS C. BRADLEY,
Attorney for Defendant.